Public Prosecutor v Mohamed Shahabuddin Mohamed Ali & Ors

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–388–08 OF 2017
ZAWAWI SALLEH, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
17 APRIL 2018

Criminal Procedure — Charge — Reduction of — Whether decision of learned trial judge at close of prosecution's case in reducing charge against respondents from offence of murder to one of culpable homicide not amounting to murder and in calling respondents to enter their defence on the said amended charge appealable to Court of Appeal — Court of Judicature Act 1964 ss 3 & 50(1) — Penal Code ss 302 & 304(a)

In the instant appeal, the legal issues raised was whether the decision of the learned trial judge at the close of the prosecution's case in reducing the charge against the respondents from the offence of murder under s 302 of the Penal Code ('the Code') read together with s 34 of the same Code to one of culpable homicide not amounting to murder under s 304(a) of the Code read together with s 34 of the Code and in calling the respondents to enter their defence on the said amended charge was appealable to the Court of Appeal. The respondents submitted that the trial of the respondents had not been finally disposed of yet, as such, the appeal was premature, if not, unnecessary. On the other hand, the appellant submitted that there was a final disposal of the matter regarding the murder charge. Further, the public prosecutor, as a dissatisfied party, could appeal against the impugned decision to the Court of Appeal within the meaning of s 50(1) of the Court of Judicature Act 1964 ('the CJA').

Held, striking out the appeal and remitting the case to the High Court for the same trial judge to hear the defence of the respondents on the amended charge:

(1) The learned judge at the end of the prosecution's case had not finally disposed of the rights of the parties in the trial. Only a decision at the close of the defence's case would effectively disposed the rights of the parties. The decision of the learned trial judge in reducing the charge from the offence of murder to one of culpable homicide under s 304(a) of the Code and in calling the respondents to enter their defence on the amended charge was not a decision within the meaning of s 3 of the CJA and, therefore, was not appealable (see paras 23–24 & 32).

[Bahasa Malaysia summary

Dalam rayuan ini, isu undang-undang yang dibangkitkan adalah sama ada keputusan hakim perbicaraan yang bijaksana di akhir kes pendakwaan dalam mengurangkan tuduhan terhadap responden-responden daripada kesalahan membunuh di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama dengan s 34 Kanun yang sama kepada satu homisid salah yang tidak menjumlahkan kepada pembunuhan di bawah s 304(a) Kanun dibaca bersama dengan s 34 Kanun dan dalam memanggil responden-responden untuk memasukkan pembelaan mereka atas tuduhan yang dipinda tersebut adalah boleh dirayu kepada Mahkamah Rayuan. Responden-responden berhujah bahawa perbicaraan responden-responden belum didengar lagi, dengan itu, rayuan adalah pra matang, jika tidak, tidak perlu. Sebaliknya, perayu berhujah bahawa terdapat pendengaran muktamad perkara berkaitan tuduhan membunuh tersebut. Selanjutnya, pendakwa raya, sebagi pihak yang tidak berpuas hati, boleh merayu terhadap keputusan yang dipersoalkan tersebut kepada Mahkamah Rayuan dalam maksud s 50(1) Akta Mahkamah Kehakiman 1964 ('AMK').

Diputuskan, membatalkan rayuan dan meremit semula kes kepada Mahkamah Tinggi untuk hakim perbicaraan yang sama mendengar pembelaan responden-responden atas tuduhan yang dipinda:

(1) Hakim yang bijaksana di akhir kes pihak pendakwaan tidak akhirnya melepaskan hak pihak-pihak dalam perbicaraan tersebut. Hanya keputusan pada akhir kes pembelaan akan secara efektif melepaskan hak pihak-pihak. Keputusan hakim perbicaraan yang bijaksana dalam mengurangkan tuduhan daripada kesalahan membunuh kepada satu homisid salah di bawah s 304(a) Kanun dan dalam responden-responden untuk memasukkan pembelaan mereka atas tuduhan yang dipinda bukan keputusan dalam maksud s 3 AMK dan, oleh itu, tidak dapat dirayukan (lihat perenggan 23–24 & 32).]

Notes

For cases on reduction of charge, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1850–1854.

Cases referred to

Dato' Seri Anwar Ibrahim v PP [2010] 6 MLJ 585; [2010] 9 CLJ 625, FC (refd)
Karpal Singh a/l Ram Singh v PP [2012] 5 MLJ 293, FC (refd)
Koh Zhan Quan Tony v PP and another motion [2006] 2 SLR 830; [2006] SGCA 17, CA (refd)
Mohamad Ridzuan bin Zamhor lwn Pendakwa Raya [2018] 6 MLJ 606; [2018] 2 AMR 17, CA (refd)
Letchumanan a/l Suppiah v PP and another appeal [2009] 5 MLJ 597; [2009] 5 CLJ 652, FC (refd)

PP v Hii Tiong Sua & Anor Criminal Appeal No Q-05-(S)-96–04 of 2013 (unreported), HC (refd)
PP v Musdar bin Rusli [2017] 5 MLJ 628; [2017] CLJ 703, CA (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129, CA (refd)
Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 50, 50(1)
Criminal Procedure Code ss 112, 182A
Penal Code ss 34, 302, 304(a), 309, 354

Appeal from: Criminal Trial No 45B-8–04 of 2016 (High Court, Pulau Pinang)

Faizah bt Mohd Salleh (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
RSN Rayer (R Nethaji Rayer & Co) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] The legal issue in the instant appeal is quite narrow, namely, whether the decision of the learned trial judge at the close of the prosecution's case in reducing the charge against the respondents from the offence of murder under s 302 of the Penal Code read together with s 34 of the same Code to one of culpable homicide not amounting to murder under s 304(a) of the Penal Code read together with s 34 of the same Code and in calling the respondents to enter their defence on the said amended charge is appealable to the Court of Appeal.

THE FACTUAL ANTECEDENTS

[2] In order to place the issue in this instant appeal in its proper perspective, it is necessary to recount briefly the history of the proceedings.

[3] The respondents were jointly charged with the murder of one Chew Hup Kheng, an offence punishable under s 302 of the Penal Code read together with s 34 of the same Code. The offence was alleged to have been committed on 1 May 2015, at about 7.05am, at the roadside infront of Chulia Court, Lebuh Chulia, in the District of Timur Laut, Penang.

[4] The trial of the prosecution's case took eight days and 11 witnesses were called to testify for the prosecution.

[5] At the close of the prosecution's case, the parties filed their written submissions as directed by the learned trial judge and the oral arguments were heard on 2 June 2017.

[6] After subjecting the prosecution's case to a maximum evaluation, the learned trial judge held that the prosecution had failed to establish a prima facie case of murder under s 302 of Penal Code. Consequently, the learned trial judge had reduced the charge from the offence of murder under s 302 of the Penal Code read together with s 34 of the same Code to one of culpable homicide not amounting to murder under s 304(a) of the Penal Code read together with s 34 of the same Code.

[7] The amended charge was read out to all the respondents on 26 July 2017. They were scheduled to plead on the amended charge on 7 September 2017. The prosecution, however, on 7 August 2017, had filed the notice of appeal against the decision of the learned trial judge to the Court of Appeal. The trial was postponed pending the disposal of the PP's appeal in the Court of Appeal.

PRELIMINARY OBJECTION

[8] At the outset of the hearing of this appeal, learned counsel for the respondents raised a preliminary objection stating that the public prosecutor ('PP') had no right to appeal because the trial of the respondents had not been finally disposed of yet. The decision relates to an uncompleted criminal proceedings. The ruling of the learned trial judge in calling the respondents to enter their defence on the amended charge does not constitute a final order. The High Court should be allowed to hear the respondents' defence.

[9] Learned counsel further contended that any dissatisfaction on the part of the PP against the said ruling may be brought up by filing an appeal at the end of the whole case. The appeal is premature, if not, unnecessary.

[10] In reply, the learned deputy public prosecutor ('DPP'), in the person of Puan Faizah bt Mohd Salleh, spiritedly and passionately argued that the decision of the learned trial judge is indeed appealable. According to learned DPP, the prosecution has a right of appeal against the decision of the learned trial judge since by calling the respondents to enter their defence on the reduced charge, it would mean that they were acquitted from the original charge of murder. In other words, it was submitted that there was already a final disposal of the matter regarding the murder charge. The PP, as a dissatisfied party, could appeal against the impugned decision to the Court of Appeal within the meaning of s 50(1) of the Courts of Judicature Act 1964 ('the CJA').

[11] In support of her submission, reliance was placed on the decisions in *Letchumanan a/l Suppiah v Public Prosecutor and another appeal* [2009] 5 MLJ 597; [2009] 5 CLJ 652, *Koh Zhan Quan Tony v Public Prosecutor and another motion* [2006] SGCA 17 (reported in [2006] 2 SLR 830).

OUR FINDINGS

[12] Section 50(1) of the Courts of Judicature Act 1964 ('the CJA') provides the appellate jurisdiction of the Court of Appeal as follows:

> Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court —
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> (a) In the exercise of its original jurisdiction; and
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> (b) In the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Session Court.

[13] The word 'decision' is defined in s 3 of the CJA as follows:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the cause of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[14] Clearly, the right of appeal against any decision of the High Court in respect of criminal matter does not include any ruling made in the cause of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties (see *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495; *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 585; [2010] 9 CLJ 625; *Mohamad Ridzuan bin Zamhor lwn Pendakwa Raya* [2018] 6 MLJ 606; [2018] 2 AMR 17).

[15] The concept of a 'final decision' seems straightforward enough. In a broad term, a final decision is one that disposes of a cause on its merits and leave no question open for judicial determination. In practice, however, there is undoubtedly some confusion existing as what constitutes a final decision. In this connection, legal precedent is very useful guide in deciding this matter.

[16] In *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129, the accused were acquitted by the magistrate's court at the close of the prosecution case on a charge under s 354 of the Penal Code. On appeal to the High Court, the accused were ordered to enter their defence on the said charge. The accused being dissatisfied with the High Court decision, applied for leave to appeal to the Court of Appeal. The Court of Appeal, however, ruled at p 137, as follows:

> The order of the High Court in the present case for which leave to appeal is sought was that the applicants were to enter their defence. At the state or making the order,

A certainly it has no finality in its intent. Only after the close of the defence as a result of that order will there be finality. Only after the close of the defence will there be a decision to 'affect the event of the appeal', meaning that the defence story will finally determine the result of the whole case which was the purpose of the appeal.

B The Court of Appeal further ruled at a p 138:

So, for the purpose of s 50(2) (of the CJA), this court has to first ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter their defence was a ruling that had the effect of finally disposing of their rights. Certainly not, and it would only happen after a decision had been made at the close of the C defence.

[17] In the unreported case of *Public Prosecutor v Hii Tiong Sua & Anor* (Criminal Appeal No Q-05-(S)-96–04 of 2013), an appeal was filed by the PP against the decision of the High Court in reducing the charge against the third D and sixth accused from a charge under s 302 of the Penal Code read together with s 34 of the same Code to s 304(a) read together with s 34 of the Code at the close of the prosecution's case. Altogether six accused persons were jointly charged in the case but four of them were acquitted and discharged at the close of the prosecution's case. No appeal was filed against the acquittal of the four E accused persons.

[18] The Court of Appeal went on to hear the appeal on the issue whether the prosecution had adduced sufficient evidence under s 302 of the Penal Code F to establish a prima facie case against the two respondents at the end of the prosecution case. The court ruled that the trial judge had the power to do what he did in the case that is to amend the charge to a lesser offence under s 304(a) of the Penal Code.

G **[19]** The court went further and stated that the more important issue in the appeal was *whether the decision or ruling of the learned High Court judge is appealable at all and ruled that the appeal was premature*. The Court of Appeal further opined that once the court alters or adds a charge, including an amendment to the charge, the trial should proceed immediately on the H amended or added charges, unless for some reasons the court considers that to proceed immediately with the trial will prejudice the accused in his defence (see para 21 of the judgment).

I **[20]** The PP's appeal was dismissed on the ground that the decision or ruling of the High Court judge was not appealable because it was a decision or ruling made in the course of trial or hearing which does not finally dispose of the rights of the parties.

[21] It is pertinent to note that the decision of the Court of Appeal was affirmed by the Federal Court on 8 September 2015 in Case No 05–158–07 of 2014 (coram: Md Raus bin Sharif CJ, Abdull Hamid bin Embong, Ahmad bin Haji Maarop, Zainun bt Ali, Abu Samah bin Nordin FCJJ).

[22] In *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 585; [2010] 9 CLJ 625, the same issue ie whether the decision made in the course of trial or hearing which does not finally dispose of the right of the parties is appealable was canvassed and ruled upon. In that case, learned counsel for the appellant had applied for a statement of the complainant (PW1) recorded under s 112 of the CPC to be produced for examination by the appellant. The learned trial judge in that case dismissed the application. The appellant appealed to the Court of Appeal and before the Court of Appeal the prosecution took the stand that the ruling of the trial judge under challenge does not fall within the term 'decision' as defined in s 3 of the Courts of Judicature Act 1964 ('the CJA') and hence not appealable. The Court of Appeal agreed with the prosecution. The appellant then appealed to the Federal Court. In hearing the appeal, the Federal Court visited s 50 of the CJA which provides the jurisdiction of the Court of Appeal to hear any appeal against any decision made by the High Court. The Federal Court then refers to s 3 of the CJA 1964 which defines the meaning of the word 'decision' used in s 50(1) of the CJA. Section 3 of the CJA defines the word 'decision' to mean judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the right of the parties. The Federal Court ruled that the decision was not appealable because it is a decision or ruling made in the course of trial or hearing which does not finally dispose of the rights of the parties.

[23] So too here. We are of the considered opinion that the decision of the learned trial judge in reducing the charge from the offence of murder under s 302 of the Penal Code to one of culpable homicide under s 304(a) of the same Code and in calling the respondents to enter their defence on the amended charge is not a decision within the meaning of s 3 of the CJA and, therefore, is not appealable.

[24] In this instant appeal, the respondents were scheduled to plead on amended charge on 7 September 2017. However, the trial was postponed due to the appeal filed by the PP against the decision of the learned trial judge in amending the charge. Certainly, the decision of the learned trial judge has not finally dispose of the rights of the parties. The learned trial judge had not made a final determination of the rights of the parties at this stage. Something still had to be done by the learned trial judge, ie to hear the respondents' defence and make a decision pursuant to s 182A of the Criminal Procedure Code. Only a decision at the close of the defence's case would effectively disposed the rights

of the parties. Further, to have a final decision in this case, the respondents must be convicted and sentenced or discharge and acquitted, as the case maybe. It would, in our view, be incongruous to allow the PP to appeal to this court before the final judgment is meted out by the trial court.

[25] Our courts have applied a 'salutary general rule' in criminal and civil proceedings for many years that appeals are not entertained piecemeal. Decision of the High Courts have generally been held to be appealable only if they have three attributes. They must be final in effect, definitive of the rights of the parties, effectively dispose of a substantial part of the relief claimed in the main proceedings and it does no leave anything to be done in the trial with respect of the merits of the case. In other words, the rule, in general, permits an appeal to be taken only from a final decision which dispose of all the issues presented in the trial. Quite obviously, all the issues in the case at bench were not disposed of if the respondents have yet to testify in their defence.

[26] The PP would not be prejudiced because at the end of the case, it would still have the right to appeal to the Court of Appeal and further to the Federal Court against the decision of the learned trial judge. The PP may still impugn the ruling of the learned trial judge as part of its grounds of appeal.

[27] For example, in *Public Prosecutor v Musdar bin Rusli* [2017] 5 MLJ 628; [2017] CLJ 703, the respondent was originally charged with: (i) murder under s 302 of the Penal Code; and (ii) an attempt to commit suicide, an offence under s 309 of the same Code. However, at the end of the prosecution's case, the charge was amended by the learned judicial commissioner to one under culpable homicide not amounting to murder under s 304(a) of the Penal Code. The respondent forthwith pleaded guilty to the said amended charge and was sentenced to 25 years imprisonment for the offence under s 304(a) of the Penal Code. Dissatisfied, the PP appealed to the Court of Appeal. The issue before the Court of Appeal is whether the respondent was rightly convicted for the reduced charge. The Court of Appeal held that where such injuries which were intentionally inflicted by the respondent on the deceased were sufficient in the ordinary course of nature to cause death, it would indeed be a travesty of justice to hold that the respondent was guilty only of the lesser offence of culpable homicide not amounting to murder and punishable under s 304 of the Penal Code. The decision of the High Court judge was set aside and substituted with a conviction for murder, punishable under s 302 of the Penal Code. The respondent was sentenced to death.

[28] Criminal trials must begin and conclude without unreasonable delay. Appeals should not be entertained before a trial has run its course. It is therefore, in the interest of justice that finality should be reached in criminal case and that the trial should not be allowed to drag on indefinitely.

[29] Interrupting and delaying a criminal trial, is in itself undesirable especially if it means that witnesses have to be brought back after a break of several months.

[30] Piecemeal appeal can be costly and inefficient. One can imagine how long it would take to resolve a case if the parties could immediately appeal consequent upon to every decision leading up to trial. It would cause a 'tsunami' of appeals and the Court of Appeal would be swamped.

[31] We associate ourselves with the sentiments expressed in *Karpal Singh a/l Ram Singh v Public Prosecutor* [2012] 5 MLJ 293, where the Federal Court stated:

> [17] The rationale for non-final decisions being non-appealable is primarily geared towards the speedy disposal of cases; such a policy prejudices nobody in light of the many complaints of ageing cases before. The explanatory notes, clarifying the amendment of s 3 of the CJA introduced by the Amendment Act A1031 of 1998 reads:
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> > Pada masa ini, semasa mendengar kes, jika mahkamah membuat keputusan tentang kebolehterimaan apa-apa keterangan atau dokumen, pihak yang tidak berpuas hati boleh memfailkan rayuan. Jika rayuan sedemikian difailkan, mahkamah terpaksa memberhentikan pendengaran kes itu sementara menanti keputusan rayuan itu oleh mahkamah atasan. Ini menyebabkan pendengaran itu lambat selesai, lebih-lebih lagi apabila rayuan difailkan terhadap tiap-tiap keputusan yang dibuat oleh mahkamah bicara. Pindaan ini dicadangkan untuk membantu mempercepat pendengaran kes di mahkamah bicara.
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> [18] From the above explanation it is obvious that Parliament is not oblivious to mid-stream appeals that tend to stall proceedings and delay speedy completion of cases. With justice not being served by unnecessary delays, what with the amended meaning of 'decision' being crystal clear, such technical appeal that have the effect of stalling hearings, are now things of the past (see *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 585; [2010] 9 CLJ 625). No appeal is permitted if viewed as incompetent and precluded by law, and with the facts as they were before us, we agree with the learned DPP that there was no finality in the decision of the Court of Appeal.

CONCLUSION

[32] For all these reasons, we sustained the preliminary objection taken by learned counsel for the respondents. In our view, this instant appeal was not competent because the findings of the learned trial judge at the end of the prosecution's case had not finally disposed of the rights of the parties in the trial.

[33] Consequently, we struck out the appeal and made a further order that the case be remitted back to the High Court for the same learned trial judge to hear the defence of the respondents on the amended charge. So ordered.

Appeal struck out; case remitted back to High Court for the same trial judge to hear the defence of respondents on amended charge.

Reported by Dzulqarnain Ab Fatar